

Teacher Fluency

In its history, our country has periodically experienced waves of nationalism that have included English-only policies that have affected teachers as well as students. Another effect has been litigation to test the legality of the scope and application of these policies. In the subsequent periods of patriotic fervor, the courts have had to address not only the citizenship, but also the English proficiency of K-12 teachers. The following case and the accompanying question-and-answer discussion provide recent illustrations of state laws and resulting court decisions specific to the language proficiency of public school teachers.

The Case

During the 2002-2003 school year, Ms. Robishaw was a first-grade teacher in Lowell, Massachusetts. Born in Cambodia, she had come to the United States as a refugee after escaping from the mass killings under the Khmer Rouge regime. Her teaching career in Lowell, which had a large population of students of Cambodian descent, started in 1992. Her teaching evaluations prior to the 2002-2003 school year had been consistently "satisfactory," which was the highest rating available.

In October 2002, her new principal expressed concern to the superintendent about the English proficiency of Robishaw and some of her fellow teachers at the school. From October 2002 to January 2003 the principal evaluated Robishaw, resulting in an overall rating of "unsatisfactory," which included "inability to orally communicate effectively."

In the interim, specifically in November 2002, the Massachusetts voters passed an initiative referendum that eliminated bilingual education programs in the state and required all public school teachers to be "fluent and literate in English." In March 2003, the state commissioner of education followed up with a memorandum to school districts requiring every superintendent and charter school head, starting with the 2003-2004 school year, to sign an assurance verifying the English fluency and



literacy of all teachers. The memo outlined four permissible fluency assessment methods, including achieving an acceptable score on a test accepted by the commissioner and any alternative method accepted by the commissioner. Promptly thereafter, most of the memorandum became codified in state regulations.

In February 2003, after the principal shared the results of the evaluation with her, Robishaw took a medical leave based on symptoms of post-traumatic stress disorder (PTSD).

In March 2003, the school district issued a policy in the wake of the commissioner's memorandum that included a screening exemption for any teacher who passed SPEAK, an

adult test of oral English communication skills scored by trained raters from outside the district who did not know the test takers. The SPEAK test did not have the commissioner's approval.

Later in March, Robishaw wrote a letter to the assistant superintendent in charge of the new policy requesting postponement of the testing because of her medical condition and the medications she was taking. The assistant superintendent declined

her request, and later that spring Robishaw took and failed both the SPEAK and oral proficiency interview (OPI) tests while still on medical leave.

In June 2005, Robishaw notified the superintendent that she was medically ready to return to teach for the 2005-2006 school year. In response, the superintendent issued an intent-to-terminate notice based on the principal's January 2003 evaluation and Robishaw's subsequent SPEAK and OPI test scores. After a formal hearing, the district notified Robishaw of her termination based on her demonstrated level of English fluency.

Per Massachusetts law, in June 2006 Robishaw filed for binding grievance arbitration under the collective-bargaining agreement

between the teachers' union and the district.

In January 2007, the arbitrator concluded that the district did not have just cause for terminating Robishaw based on due process grounds. First, he reasoned that the test results were procedurally unfair because the test graders had not been available for cross-examination, and the testimony of her treating psychologist that Robishaw's medical condition negatively affected her ability to demonstrate the requisite testing level for fluency. Similarly discounting the principal's evaluation for failure to warn Robishaw that her fluency was being assessed and to have a designated standard or benchmark for this purpose, the

arbitrator granted her reinstatement with back pay and benefits to August 2005. In response, the district filed for appeal in state court.

In October 2008, the state superior court vacated the arbitration award as contravening state law and public policy. Robishaw appealed to the state's highest court.

What do you think was the decision of the Massachusetts Supreme Court?

In *School Committee of Lowell v. Robishaw* (2010), Massachusetts' highest court reversed the lower court and confirmed the arbitration award in favor of Robishaw. First, the court concluded that the award did not contravene state law, interpreting it as permitting classroom observation as the basis for assessment but not requiring termination if the underlying basis for the assessment was not conducted in a procedurally appropriate manner and without a substantively valid standard.

Although concluding that the arbitrator's exclusion of Robishaw's OPI test results based on the unavailability of the test graders did contravene the state law's specification of this test and designated level, the court upheld the arbitrator's independent reliance on the other source of invalidity—his factual finding that Robishaw's PTSD inhibited her high-stakes, test-taking ability. Second, the appellate court concluded that the lower court could not rely on public policy because the state law specifically codified public policy, and the judge should not have undertaken his own independent evaluation of Robishaw's level of fluency due to “the restricted scope of a court's review of an arbitral decision.”

Does the decision in favor of Robishaw tie the hands of school authorities in Massachusetts from terminating teachers who fail the OPI after the observation or interview options raise reasonable suspicion about their having the requisite level of fluency?

No. Although teachers in Massachusetts may challenge their terminations

under the arbitration provisions of collective bargaining agreements, this state supreme court decision provides them with a narrow avenue for challenging the results—providing sufficient evidence to convince the arbitrator that they suffer from a medical condition that would invalidate the OPI results.

Is Robishaw's victory generalizable to other jurisdictions?

No. The key to this case was that the collective-bargaining context led to binding grievance arbitration, which courts have generally upheld.

Has the priority on English-language learners (ELL) increased the likelihood of litigation concerning the English proficiency of teachers, despite the federal civil rights laws protection for teachers against national origin discrimination?

Yes, and school districts still have sufficient general leeway to enforce rational requirements for English proficiency. For example, in *Fong v. School Board of Broward County* (2014), the 11th Circuit upheld the dismissal of a teacher of Chinese descent who claimed that the district had engaged in national origin discrimination in violation of Title VII of the Civil Rights Act. The district had hired the principal to turn around the failing school, which had a large number of ELL students.

Based on the principal's evaluation, the school board decided not to renew the teacher's contract based on language and classroom management problems, her resistance to suggested improvements, and her lack of fit with the at-risk population of the school. Affirming the summary judgment for the school district, the 11th Circuit concluded that the principal's feedback about the teacher's accent was not evidence of the requisite discrimination because the principal “had a legitimate interest in ensuring that [the plaintiff-teacher's] students were able to understand her in the classroom.” Moreover, the school district

had articulated legitimate nondiscriminatory reasons, including classroom management, for its adverse action.

Doesn't this emphasis on English proficiency violate the rights of ELL students with regard to bilingual education?

Not necessarily. Even in the first major case that interpreted federal civil rights law to require special steps for ELL students, the Supreme Court in *Lau v. Nichols* (1974) made clear that “No specific remedy is urged upon us. Teaching English to [these students of foreign] ancestry who do not speak the language is one choice. Giving instructions to this group in [their native language] is another. There may be others.” For this methodological choice, the political and judicial tides have turned in recent years. More states, as exemplified by Massachusetts' 2002 law in Robishaw's case, have moved away from bilingual to specialized English approaches, and the courts have increasingly interpreted federal law to allow such choices.

Conclusion

This visit to relatively recent court decisions concerning the English proficiency of teachers from other countries reflects a recent movement in state legislatures and in the courts toward an emphasis on English. Robishaw's case specifically points to issues of procedural fairness and reasonable substantive standards for English proficiency requirements for teachers. The subsequently sampled cases illustrate limits in terms of national origin discrimination and appropriate steps for ELL students. Within these broad boundaries, it is left to the good faith discretion of K-8 principals and other education leaders to advocate and implement policies and practices that balance our national urge for homogenization with a healthy respect for individual diversity. 

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